Filed 4/15/03 Rodriguez v. Crown Toyota CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

JUAN CARLOS RODRIGUEZ et al.,	
Plaintiffs and Appellants,	E030389
v.	(Super.Ct.No. RCV049944)
CROWN TOYOTA et al.,	OPINION
Defendants and Respondents.	

APPEAL from the Superior Court of San Bernardino County. Peter H. Norell, Judge. Affirmed.

Rastegar & Matern and Matthew J. Matern for Plaintiffs and Appellants.

Callahan, McCune & Willis and Lee A. Sherman for Defendants and Respondents.

Plaintiffs Juan Carlos Rodriguez and Lynn Marie Rodriguez,[1] husband and wife (collectively, the Rodriguezes), appeal from a judgment entered in favor of defendants Crown Toyota (Crown) and Atlas Dealer Services (collectively Defendants) after their motion for summary judgment was granted. The Rodriguezes claim that the trial court erred because Defendants did not meet their burden of production and because the evidence reflected the existence of triable issues of material fact. They also claim that the trial court erred in refusing to continue the hearing on the motion to allow them to file a responsive separate statement required by Code of Civil Procedure section 437c, subdivision (b). In addition, the Rodriguezes appeal from a postjudgment order awarding Defendants attorney fees. They claim that Defendants did not file a noticed motion as required and that the trial court failed to apportion fees between the contract and tort causes of action. We affirm.

FACTS AND PROCEDURAL HISTORY

On May 23, 1999, the Rodriguezes leased a used GMC Yukon from Crown. The original lease documents listed the vehicle as a model year "97." The window sticker on the vehicle and the salesman also identified it as a model year "97." A couple of weeks later, Crown called Juan and asked him to come in and sign a new lease that would result in a benefit to him. On June 20, 1999, Juan signed a second lease agreement that added a

[1] Juan Carlos Rodriguez and Lynn Marie Rodriguez will hereafter be individually referred to by their first names, not out of any familiarity or disrespect, but to ease the burden on the reader. (See, e.g., *In re Marriage of Schaffer* (1999) 69 Cal.App.4th 801, 803, fn. 2.)

$600 lease acquisition fee and listed the vehicle as a model year "96." Juan did not notice, before signing the new lease, that the model year had been changed. About one month later, the Rodriguezes learned that the Department of Motor Vehicles listed the Yukon as a model year "96" when Juan checked on the status of his personalized license plates. However, they did not contact Crown to determine what the model year of the vehicle actually was, nor did they make any complaints.

Crown first learned of the discrepancy over one year later, on September 8, 2000, when the Rodriguezes filed a complaint against Defendants because they were having difficulty with respect to a vehicle repair. The operative first amended complaint, filed January 2, 2001, asserted six causes of action, including breach of contract, breach of express and implied warranties, rescission, negligence and fraud. Defendants answered and soon filed a motion for summary judgment. The Rodriguezes filed a late opposition, as well as a separate statement of disputed facts. However, they did not file the required "separate statement which respond[ed] to each of the material facts contended by the moving party to be undisputed, indicating whether [they] agree[d] or disagree[d] that those facts are undisputed . . . ." (Code Civ. Proc., § 437c, subd. (b).)

After hearing argument, the trial court granted Defendants' motion. Judgment was entered on April 23, 2001. Defendants then filed a memorandum of costs that included a line item for contractual attorney fees. The Rodriguezes filed a motion to tax costs, attacking the request for attorney fees since Defendants had not filed a noticed motion. At a hearing on the motion to tax, the trial court found that the Defendants "may be

entitled to reasonable attorneys' fees under the [lease] contract." It also found that it did not have enough information to make that award. It therefore continued the hearing for one month to allow the parties to submit additional filings. On August 1, 2001, the trial court issued an order granting Defendants' request for attorney fees and costs in the amount of $18,961. This appeal followed.

DISCUSSION

Preliminarily, we note that the notice of appeal purports to appeal from the judgment in favor of Atlas Dealer Services as well as Crown. However, the appellants' opening brief does not assert any trial court error in entering judgment on behalf of Atlas Dealer Services. Further, the record reflects that the Rodriguezes stipulated to the entry of judgment as to that defendant. Therefore, we affirm the judgment as to Atlas Dealer Services. (*Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 407, fn. 5 [issues not raised in brief deemed waived or abandoned]; *Norgart v. Upjohn Co*. (1999) 21 Cal.4th 383, 399-400 [no appeal of consent judgment].)

In addition, at oral argument on Defendants' motion, counsel for the Rodriguezes conceded that they had no argument why the trial court should not grant summary adjudication as to any issues other than the claim for fraud. This concession is supported by their written opposition, which addressed itself entirely to the existence of a triable issue of material fact that they were defrauded, to the exclusion of their remaining causes of action. An attorney's stipulation or concession of facts is binding and serves to remove the matter stipulated or conceded to from the issues to be determined by the

court. (*Casey v. Overhead Door Corp*. (1999) 74 Cal.App.4th 112, 124, disapproved on other grounds in *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481, fn. 1.) Therefore, we will not consider on appeal issues that were capitulated to below. (See, e.g., *Masters v. San Bernardino County Employees Retirement Assn*. (1995) 32 Cal.App.4th 30, 50-51.)

A. *Standard of Review for Summary Judgment*

The purpose of summary judgment "is to provide courts with a mechanism to cut through the parties' pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute. [Citation.]" (*Aguilar v. Atlantic Richfield Co*. (2001) 25 Cal.4th 826, 844 (*Aguilar*).) Our de novo review is governed by Code of Civil Procedure section 437c, which provides in subdivision (c) that a motion for summary judgment may only be granted when, considering all of the evidence set forth in the papers and all inferences reasonably deducible therefrom, it has been demonstrated that there is no triable issue as to any material fact and the cause of action has no merit. The pleadings govern the issues to be addressed. (*City of Morgan Hill v. Brown* (1999) 71 Cal.App.4th 1114, 1121.) A defendant moving for summary judgment bears the burden of persuasion that there is no triable issue. This burden is met by producing evidence that demonstrates that a cause of action has no merit because one or more of its elements cannot be established to the degree of proof that would be required at trial, or that there is a complete defense to it. Once that has been accomplished, the burden shifts to the plaintiff to show, by producing evidence of specific facts, that a triable issue of

material fact exists as to the cause of action or the defense. (*Aguilar*, *supra*, 25 Cal.4th at pp. 849-851, 854-855.)

B. *Defendants Met Their Burden of Production*

As a result of the concessions below, the only issue before us is whether Crown produced evidence showing that the Rodriguezes could not establish each of the elements of their fraud cause of action. The first amended complaint alleges that Crown defrauded the Rodriguezes in that (1) they were told that the lease they entered into on May 23, 1999, was for a 1997 vehicle, whereas, in truth, the vehicle was a 1996 model; (2) they were not informed that the model year was changed to 1996 when executing the second lease; and (3) the vehicle had substantial defects that lowered its value.

"The elements of fraud that will give rise to a tort action for deceit are: '"(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage."' [Citation.]" (*Engalla v. Permanente Medical Group, Inc*. (1997) 15 Cal.4th 951, 974 (*Engalla*).) Crown argued that the Rodriguezes could not establish any element of their cause of action.

Misrepresentation could not be established since the first lease agreement was rescinded and replaced by a novation, the second lease agreement. Rescission simply requires the mutual consent of the contracting parties. (Civ. Code, § 1689, subd. (a).) Because it was rescinded, there could be no cause of action, including one for fraud, based upon the first lease. (*Evans v. Rancho Royale Hotel Co*. (1952) 114 Cal.App.2d

503, 507.) Further, a novation, which is the substitution of a new obligation with the intent that it should replace an existing one, extinguishes the original lease and renders moot any claim based upon it. (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431-432; Civ. Code, §§ 1530, 1531.)

The Rodriguezes admitted that they were requested to sign a new lease agreement. Juan voluntarily signed the new lease agreement, for himself, and with her written authorization on Lynn's behalf. Lynn understood that the second lease was a "new auto contract." Juan had ample opportunity to review the documents related to the second lease before signing them, and nothing on them was hidden from him. Juan also signed an acknowledgment that he, freely and without duress, rescinded the first lease due to "resdual [*sic*] error and year make" and that it had no legal effect, but was replaced by a new lease. No payments were ever made under the first lease, only in accordance with the second, which states that it is the only agreement between the parties and acknowledges that there are no others. In addition, Crown showed that the Rodriguezes both admitted that it had made no misrepresentations about the condition of the vehicle other than the year.

These facts establish the rescission of the first lease and a novation, and thus that the Rodriguezes had no viable claim with respect to the first lease. They also show that the Rodriguezes were aware that the model year had been altered when executing the second lease, and that there was no other nondisclosure about the vehicle. Thus, Crown established that there was no misrepresentation of fact.

There having been no misrepresentation, there cannot have been any knowledge of a false statement or intent to defraud on Crown's part. In addition, the Rodriguezes testified that they had no evidence that Crown intentionally, rather than negligently initially represented the vehicle as a 1997 model.

Crown also argued that there was no actual or justifiable reliance on any misrepresentation, even had there been one. Actual reliance exists when a misrepresentation is a substantial factor in inducing a party to act and without which the party would, in all reasonable probability, not have entered into the agreement. (*Engalla*, *supra*, 15 Cal.4th at pp. 976-977.) While Juan testified that he had in his mind that he did not want a vehicle that was more than two years old, he agreed that the age of the vehicle was not as important to him as low mileage. He admitted that he would have purchased a 1995 model year vehicle if it had the other attributes that he was looking for. Lynn also testified that, by itself, the fact that the vehicle was a 1996 model was not a problem. The fact that the vehicle was a GMC was most important to her. Both agreed that the vehicle they leased had all of the attributes that they wanted.

While this evidence shows that the Rodriguezes would have leased a 1996 vehicle, and that the model year was not a substantial factor in their choice to enter a lease agreement, it does not establish that they would have paid the same price for a 1996 vehicle as they did for what they believed was a 1997 vehicle with the same attributes. However, there is another relevant fact. While the Rodriguezes learned of the possible discrepancy with respect to the model year of the vehicle in July 1999, they did nothing

about it for some 14 months, all the while continuing to perform under the lease, and then only acted because they had a dispute with Crown over who would pay for a repair. This fact makes any assertion that they were unhappy with the price that they paid, or otherwise did not wish to accept the price paid for the vehicle that they obtained, unreasonable at best. Crown's evidence establishes that the Rodriguezes did not actually rely on the model year when choosing to enter into the lease agreement.

Crown also demonstrated that the Rodriguezes could not identify any damages that they had suffered as a result of the alleged misrepresentation. Crown having produced sufficient evidence to show that the Rodriguezes could not prove every element of their fraud cause of action, the burden shifted to them to demonstrate the existence of a triable issue of material fact.

C. *The Rodriguezes Failed to Establish A Triable Issue of Material Fact*

As indicated above, the Rodriguezes failed to submit a separate statement of disputed and undisputed facts corresponding to Crown's separate statement. (Code Civ. Proc., § 437c, subd. (b).) That fact alone is adequate ground for us to affirm the trial court's grant of the motion for summary judgment. (*Kaplan v. LaBarbera* (1997) 58 Cal.App.4th 175, 179.)

The Rodriguezes sought a continuance of the summary judgment hearing for the purpose of submitting a proper separate statement, and claim that it was an abuse of discretion for the trial court to deny their request. A trial court abuses its discretion when its decision exceeds the bounds of reason by being arbitrary, capricious or patently

absurd. (*In re Stephanie M*. (1994) 7 Cal.4th 295, 318-319.) At the hearing, counsel explained that in response to the summary judgment motion, his office attempted to settle the case. However, when opposition was due, it became clear that settlement would not be possible, and that a response would have to be filed. Counsel stated that he had filed the opposition and had failed to include a proper separate statement. However, other than the fact that he waited until the last minute to prepare the opposition (indeed the papers were filed late), he gave no reason for his failure to include a proper separate statement. Even considering the drastic nature of summary judgment, we cannot say that under these circumstances the trial court erred in refusing to allow a continuance in order to allow the Rodriguezes to file a separate statement of disputed and undisputed facts.

The request can be likened to one for a continuance in order to allow the completion of additional discovery (on appeal the Rodriguezes also make that argument). Code of Civil Procedure section 437c, subdivision (h) requires that any request for a continuance must be submitted at the time of the opposition papers and must be supported by arguments showing good cause for the delay. (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633-634.) Affidavits are required and a mere statement that discovery is desired is not sufficient. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395-398.) The Rodriguezes did not file any affidavits at any time and did not otherwise provide the information required by Code of Civil Procedure section 437c, subdivision (h). Therefore, the trial court did not abuse its discretion in failing to grant a continuance.

The opposition also failed to demonstrate the existence of a triable issue of

material fact. While Juan provided a declaration stating that he did not see or remember signing the acknowledgment that the first lease was mutually rescinded, that does not mitigate against the evidence establishing a rescission of that contract by mutual assent to entering a new contract. The Rodriguezes submitted no evidence that they had not voluntarily signed a new lease that reflected that it was the sole agreement between the parties. Nevertheless, Juan's declaration does create a triable issue of material fact with respect to why they agreed to enter the second lease. Thus, there is a question whether a misrepresentation was made when the second lease was signed.

Still, the opposing papers do not in any way attempt to respond to Crown's showing that there was neither justifiable reliance nor damages. Notably absent from Juan's declaration is any statement that they would not have entered the lease or that they would not have accepted the stated price had they been aware that the vehicle was in fact a 1996 model year and not a 1997. Also absent is any indication that they suffered any damages as a result of the misrepresentation. The Rodriguezes ask us to take judicial notice of the vehicle values from the Kelley Blue Book. Their request is denied as improperly made and as lacking in authority. Further, in the absence of any specific information about the vehicle in question, any information obtained by such an exercise would be entirely speculative. They also argue that common sense dictates that they suffered damage. Even had this "common sense" argument been forwarded below, which it was not, it does not constitute evidence of a fact sufficient to defeat summary judgment. The Rodriguezes having failed to establish the existence of a triable issue of

material fact on either the issue of justifiable reliance or that of damages, the motion for summary judgment was properly sustained.

D. *Attorney Fees*

The Rodriguezes assert two challenges to the attorney fee award. First, they claim that Defendants did not file a timely noticed motion as required by Code of Civil Procedure section 1033.5, subdivision (c)(5), and California Rules of Court, rule 870.2. Defendants improperly made a claim for contractual attorney fees in their memorandum of costs. The Rodriguezes filed a motion to tax costs, claiming that the lease did not allow for an award of attorney fees on an action for fraud and, as here, that fees could be awarded only after a noticed motion with supporting documentation. In their opposition, Defendants asserted that the lease indeed provided that they should recover attorney fees under Civil Code section 1717, since the Rodriguezes, by their action, sought both to enforce the lease and to rescind it. As indicated above, the trial court ordered additional briefing on the issue of costs, allowing one month for the submissions, of which 14 days were for the Rodriguezes' response. Defendants claimed costs in the amount of $19,435.60. In opposition, the Rodriguezes again argued that Defendants had yet to make the required noticed motion for attorney fees. They also urged that the lease did not provide for fees in this situation and that the claimed fees were excessive.

On appeal, the Rodriguezes claim that the holding in *Russell v. Trans Pacific Group* (1993) 19 Cal.App.4th 1717, 1728, that noncompliance with the procedural requirements for claiming contractual attorney fees may not be disregarded by the trial

court, is dispositive on the issue presented. We disagree. The analysis in *Russell* focuses not on the question whether a noticed motion was filed, but on the fact that no motion was filed on time. (*Id*. at pp. 1724-1728.) The fact that a noticed motion for fees was not filed at the same time as the memorandum of costs was, at that time, fatal. (*Id*. at p. 1722.) That was no longer the case here.

In order to be timely a motion for attorney fees must be filed within the time for filing a notice of appeal. (Cal. Rules of Court, rule 870.2(b)(1)). An appeal must be filed within 60 days of mailing of the notice of entry of judgment, or, lacking notice, within 180 days after judgment is entered. (Cal. Rules of Court, rule 2.) Judgment was entered on April 23, 2001. The record does not contain a notice of entry of judgment or any evidence that one was served. Therefore, Defendants had until October to file their motion. The entire matter having been dispensed with by August 1, 2001, the timeliness of the motion is not an issue.

In the absence of any concern as to the timing of the request for attorney fees, we believe that the Supreme Court's holding in *Christensen v. Dewor Developments* (1983) 33 Cal.3d 778 is instructive. There, fees were allowed because the fact that the requesting party had submitted the issue to the trial court by way of declaration and points and authorities demonstrated a compliance with the spirit, if not the letter of the law. (*Id*. at p. 786.) "The law respects form less than substance." (Civ. Code, § 3528.) The purposes for requiring a noticed motion are, of course, to apprise both the court and the opposing party of the issues that are to be addressed, and to provide that party with

sufficient time to respond to those issues. (See, e.g., *Josephson v. Superior Court* (1963) 219 Cal.App.2d 354, 362.) These purposes were served by the filings and procedures below. The Rodriguezes have pointed to nothing that leads us to conclude that the trial court erred when it treated Defendant's request for attorney fees as a noticed motion.

Next, the Rodriguezes claim that the trial court failed to apportion fees between the contract and tort causes of action. The trial court awarded Defendants $17,170 out of the $19,435.60 requested. Generally, a party seeking attorney fees under a contract may only recover those fees that relate to the causes of action on the contract. Therefore, a trial court should typically attempt to separate those fees that are recoverable from those that are not. (*Reynolds Metals Co. v. Alperson* (1979) 25 Cal.3d 124, 129-130.) However, attorney fees incurred for defending any issue common to both contract and noncontract causes of action need not be apportioned. (*Ibid*.) The decision whether or not to apportion fees is within the discretion of the trial court. (*Abdallah v. United Savings Bank* (1996) 43 Cal.App.4th 1101, 1111.)

On the information contained in the record, we cannot conclude that the trial court abused its discretion regarding the apportionment of fees between the causes of action specifically termed breach of contract and rescission, and those causes of action that were not. The issue involved in the breach of contract and rescission causes of action, to wit, Defendants' representation of the vehicle as a 1997 model year when it was actually a 1996, was also a key issue in the noncontract causes of action. Essentially, each cause of action was based upon the same factual foundation. Further, defending against the fraud

cause of action was necessary in order that Defendants could continue to enforce the lease. (See, e.g., *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 37.) Finally, the record reflects that the trial court reduced the Defendant's requested fees in excess of 11.5 percent. Under these circumstances we cannot conclude that the trial court erred in the amount of attorney fees that it awarded.

DISPOSITION

The judgment and postjudgment order for attorney fees are affirmed. Defendants to recover their costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

WARD
J.

GAUT
J.